

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

FLOYD L MORROW and
MARLENE MORROW, as taxpayers
of the City of San Diego, State of
California, and on behalf of those
similarly situated,

Plaintiffs,

vs.

CITY OF SAN DIEGO, a charter city;
and DOES 1-100,

Defendants.

CASE NO. 11cv1497-GPC(KSC)

**ORDER DENYING PLAINTIFFS'
MOTION TO AMEND; DENYING
PLAINTIFFS' MOTION TO
SUBSTITUTE PARTY DOE 1, DOE
2, AND DOE 3; AND DENYING
PLAINTIFFS' MOTION FOR
SANCTIONS WITHOUT
PREJUDICE**

[Dkt. Nos. 80, 84, 95.]

Before the Court is Plaintiffs Floyd and Marlene Morrow's motion for leave to file a sixth amended complaint. (Dkt. No. 80.) Plaintiffs also filed a motion to substitute Doe Defendants 1, 2 and 3 and a motion for sanctions pursuant to 28 U.S.C. § 1927. (Dkt. Nos. 84, 95.) Oppositions were filed by Defendant City of San Diego. (Dkt. Nos. 90, 91, 97.) An opposition was also filed by proposed Defendants University of San Diego and A. Michael Cutri. (Dkt. No. 87.) Plaintiffs filed replies. (Dkt. Nos. 92,¹ 93, 94, 98.²) The motions are submitted on the papers without oral

¹In their reply to their motion to amend, Plaintiffs filed a request for judicial notice of numerous documents that are mostly from the administrative record. (Dkt. No. 92.) The Court DENIES Plaintiffs' request for judicial notice as they are duplicative of documents already before the Court or not relied on in ruling on the

1 argument pursuant to Civil Local Rule 7.1(d)(1). After a review of the briefs,
 2 supporting documentation, and the applicable law, the Court DENIES Plaintiffs’
 3 motion to amend and motion to substitute Doe Defendants. The Court also DENIES
 4 Plaintiffs’ motion for sanctions.

5 **Background**

6 Plaintiffs are a married couple and landowners in the City Heights community
 7 of the City of San Diego. Plaintiffs are the owners of a duplex commonly known as
 8 2804 and 2806 46th Street, San Diego, CA 92105, Assessor’s Parcel Number
 9 476-392-06 (“APN-06”). Since 2006, Plaintiffs have resided in one of the duplex units
 10 and have rented the other unit out to tenants. Plaintiffs also own property to the north
 11 of APN-06, known as Assessor’s Parcel Number 476-392-11 (“APN-11”). On June 3
 12 and June 4, 2010, the City issued a Civil Penalty Notice and Orders (CPNOs) for land
 13 use violations existing on both APN-6 and APN-11. As a result, on February 15, 2011,
 14 the Administrative Hearing Officer issued a Civil Penalty Administrative Enforcement
 15 Order (CPAEO) assessing penalties of \$2,250.00; \$9,000.00; \$6,750.00; \$15,750.00;
 16 \$2,303.32 and requiring Plaintiffs to “develop” their property. The amounts levied
 17 included penalties and administrative costs. (Dkt. No. 69–14, Dickerson Decl., Ex. 12,
 18 Fifth Am. Compl. ¶ 54, 55.)

19 On March 28, 2011, Plaintiffs filed their original complaint/petition in the San
 20 Diego Superior Court with case no. 37-3011-00088456-CU-EL-CTL. (Dkt. No. 1-1.)
 21 On July 6, 2011, the City removed the case to this Court. (Dkt. No. 1.) After removal,
 22 Plaintiffs filed a second amended complaint to conform to the federal pleading
 23 requirements. (Dkt. No. 7.) On October 18, 2011, the Court granted Defendant’s
 24 motion to dismiss the second amended complaint and granted Plaintiffs leave to amend.

25 _____
 26 motion.

27 ²In their reply to their motion for sanctions, Plaintiffs filed a request for judicial
 28 notice of Exhibits 1-5, and 7 attached to the Reply Declaration of Malinda Dickenson.
 (Dkt. No. 98-1.) The Court GRANTS Plaintiffs’ request for judicial notice as to
 Exhibit No. 7 as it is related state court docket but DENIES Plaintiffs’ request for
 judicial notice as to Exhibits 1-5 as they were not relied on in ruling on the motion.

1 (Dkt. No. 20.) Plaintiffs filed a third amended complaint on November 4, 2011. (Dkt.
2 No. 22.) On January 11, 2012, this Court granted in part and denied in part the City's
3 motion to dismiss the third amended complaint. (Dkt. No. 30.) On May 11, 2012,
4 Plaintiffs filed a motion for leave to file a fourth amended complaint. (Dkt. No. 40.)
5 On July 6, 2012, the Court granted in part and denied in part Plaintiffs' motion for
6 leave to file a fourth amended complaint. (Doc. 46.) Plaintiffs filed the fourth
7 amended complaint on July 9, 2012. (Dkt. No. 47.)

8 On August 8, 2012, the City filed a motion for abstention. (Dkt. No. 51.) On
9 September 25, 2012, the District Court denied the City's motion for abstention on the
10 basis of the Younger doctrine but granted the City's motion for abstention on the basis
11 of the Pullman doctrine and remanded the case to the Superior Court for the State of
12 California, County of San Diego. (Dkt. No. 61.) The Court indicated it would retain
13 jurisdiction if Plaintiffs made an England reservation pursuant to England v. Louisiana
14 State Board of Medical Examiners, 375 U.S. 411, 421 (1964), preserving their right to
15 return to federal district court to adjudicate federal questions. On November 8, 2012,
16 Plaintiffs preserved their right to federal district court adjudication of all federal
17 questions by making their England reservation. (Dkt. No. 69-13.)

18 On December 7, 2012, the state court ordered Plaintiffs to file an amended
19 complaint that conformed to this Court's rulings, and Plaintiffs filed their fifth
20 amended complaint³ on December 14, 2012. (Dkt. No. 69-14.)

21 On February 1, 2013, the state court set a hearing on Plaintiffs' California Code
22 of Civil Procedure ("CCP") section 1094.5 petition for writ of administrative
23 mandamus ("1094.5 Writ") and Plaintiffs' CCP section 1102 petition for writ of
24 prohibition ("1102 Writ") challenging the Order issued by the Administrative Hearing
25 Officer on February 15, 2011. (Dkt. No. 69-4 at 8-10.) The state court denied the 1102
26 Writ, but granted the 1094.5 Writ. The state court found that there were newly asserted
27 code violations that were not contained in the June 3 and June 4, 2010 Civil Penalty

28 ³In state court, this was the second amended complaint filed.

1 Notices and Orders and were not subject to any Civil Penalty Notice and Order. (Dkt.
2 No. 69-4, Dickerson Decl., Ex. 2 at 9-10.) Therefore, “the City did not proceed
3 according to law and there was not a fair trial as to those issues and the findings are not
4 supported by substantial evidence.” (*Id.* at 10.) Accordingly, the Court concluded that
5 “plaintiffs shall have judgment directing that a writ of mandate issue remanding for
6 further proceedings regarding the newly asserted violations and a reassessment of the
7 penalties consistent with this ruling. The remaining causes of action asserted by
8 plaintiffs are stayed until the administrative proceeding is completed.” (*Id.*) On March
9 5, 2013, a Peremptory Writ of Mandate and an Interlocutory Judgment were filed
10 which directed the City to set aside its February 15, 2011, Civil Penalty and
11 Administrative Enforcement Order and within 60 days, the City is directed to
12 reconsider the case regarding the newly asserted violations not made part of the June
13 3 or 4, 2010 Civil Penalty Notice and Order and reassess any penalties in a manner
14 consistent with the court’s ruling. (Dkt. No. 69-4.) The Interlocutory Judgment only
15 addressed the fifth cause of action in the second amended complaint for writ of
16 prohibition under section 1102 and sixth cause of action for writ of mandamus pursuant
17 to section 1094.5.

18 On April 26, 2013, Plaintiffs returned to federal court and filed an *ex parte*
19 request for an alternative writ and/or temporary restraining order in this Court. (Dkt.
20 No. 69.) On April 30, 2013, the Court denied the Plaintiffs’ *ex parte* application for
21 alternative writ and/or temporary restraining order and set a hearing date on the motion
22 for preliminary injunction. (Dkt. No. 71.)

23 Meanwhile, in the state court proceeding, on May 1, 2013 and May 28, 2013, the
24 City held additional administrative proceedings via a contract executed by the City
25 Council with the University of San Diego. (Dkt. No. 84-8, Dickenson Decl., Ex. 6 at
26 5.) The City formally withdrew its three additional allegations and associated penalties
27 for the three additional violations not included in the June 3 and 4, 2010 CPNO. On
28 June 14, 2013, Administrative Hearing Officer A. Michael Cutri, based on the City’s

1 withdrawal of the additional allegations as to APN-06, assessed no civil penalties on
2 Parcel APN-06. (Id. at 8.) However, civil penalties of \$22,500 that were assessed on
3 February 15, 2011 pertaining solely to parcel APN-11 remain in effect. (Id. at 8.) The
4 Hearing Officer indicated that his jurisdiction was limited by the March 5, 2013
5 Peremptory Writ of Mandate which remanded the matter to consider the “newly
6 asserted violations” pertaining to parcel APN-06 and related penalties. (Id.) Therefore,
7 he stated that he lacked jurisdiction to reconsider or modify the civil penalties on parcel
8 APN-11 that were assessed in the February 15, 2011 Administrative Order. (Id.) On
9 June 24, 2013, the City filed a letter confirming the hearing officer’s findings, and on
10 June 26, 2013 the City filed a notice of compliance with peremptory writ of mandate.
11 (Dkt. No. 84-7; 84-8.)

12 On May 31, 2013, this Court denied Plaintiffs’ motion for preliminary injunction
13 and denied without prejudice motion to reset trial and related dates as it was not clear
14 whether the Superior Court had resolved the state law claims. (Dkt. No. 77.)

15 On July 12, 2013, Plaintiffs attempted to file an appeal pursuant to California
16 Government Code section 53069.4 in state court. (Dkt. No. 90-2, Brock Decl., Ex. B,
17 Reporter’s Transcript of hearing held on Oct. 4, 2013 in the San Diego Superior Court
18 case no. 37-3011-00088456-CU-EL-CTL at 18.) For some reason, the appeal never got
19 filed. (Id.) Because it was not filed, Plaintiffs on September 13, 2013 filed another
20 case: petition for writ of mandamus pursuant to CCP §§ 1085 and 1094.5 and *ex parte*
21 application for alternative writ, and/or request for immediate stay by September 23,
22 2013 in case no. 37-2013-00067168-CU-MW-CTL. (Id.; Dkt. No. 90-2, Brock Decl.,
23 Ex. C.)

24 On August 25, 2013, Plaintiffs again returned to this Court and filed the instant
25 motion to amend seeking leave to file a sixth amended complaint. (Dkt. No. 80.) On
26 September 10, 2013, the case was transferred to the undersigned judge. (Dkt. No. 82.)
27 On September 20, 2013, Plaintiffs filed a motion to substitute Doe Defendants. (Dkt.
28 No. 84.) On November 1, 2013, Plaintiffs filed a motion for sanctions. (Dkt. No. 95.)

Discussion

A. Pullman⁴ Abstention

Plaintiffs seek leave to file a sixth amended complaint seeking to add Morrow Mobiles as a real party in interest Plaintiff and to add additional causes of action. Defendant opposes arguing that the state court action has not been concluded and it is inappropriate to return to federal court at this time under the Pullman doctrine.

Pullman abstention is appropriate “only where (1) there are sensitive issues of social policy ‘upon which the federal courts ought not to enter unless no alternative to its adjudication is open,’ (2) constitutional adjudication could be avoided by a state ruling, and (3) resolution of the state law issue is uncertain.” Wolfson v. Brammer, 616 F.3d 1045, 1066 (9th Cir. 2010) (citation omitted). The Court granted Defendant’s motion for a Pullman abstention and concluded that the three factors were met.

The question at this time is when may a litigant return to federal court after having been remanded to state court under Pullman. “Once Pullman abstention is invoked by the federal court, the federal plaintiff must then seek a definitive ruling in the state courts on the state law questions before returning to the federal forum.” San Remo Hotel v. City & Cnty. of San Francisco, 145 F.3d 1095, 1104 (9th Cir. 1998) (citing Railroad Comm’n of Texas v. Pullman, 312 U.S. 643, 501-02 (1941)). A litigant may return to federal court once the state court issues a judgment or plaintiffs file a dismissal. See UPS, Inc. v. California Public Utilities Comm’n, 77 F.3d 1178, 1183 (1996) (state court judgment); Isthmus Landowners Ass’n, Inc. v. California, 601 F.2d 1087, 1089 (9th Cir. 1979) (stayed the federal action pending final determination or dismissal of the state court action and in instant case, Plaintiffs filed a dismissal without prejudice.)

Here, Defendants argue that the state court matter has not been fully adjudicated so the case should not be returned to this Court. According to Defendant, two claims

⁴Railroad Comm’n of Texas v. Pullman Co., 312 U.S. 496 (1941).

1 remain in the “Fifth Amended Complaint”⁵: first cause of action for declaratory relief
 2 and to enjoin illegal expenditure of public funds and fourth cause of action for writ of
 3 mandate pursuant to California Code of Civil Procedure section 1085. Moreover, on
 4 September 16, 2013, Plaintiffs filed a petition for writ of mandamus pursuant to
 5 sections 1085 and 1094.5; *ex parte* application for an alternative writ and/or request for
 6 immediate stay by September 23, 2013 concerning the second hearing that was
 7 conducted in May 2013 and which resulted in a second Civil Penalty Notice on June
 8 24, 2013. (Dkt. No. 90-2, Brock Decl., Ex. 2.)

9 In response, Plaintiffs do not address the newly filed petition for writ of
 10 mandamus filed on September 16, 2013, which is in essence an appeal of the City’s
 11 confirmation of the hearing officer’s findings on June 24, 2013. In their reply to their
 12 motion for sanctions, Plaintiffs state that on November 22, 2013, the state court
 13 dismissed the state action in case no. 37-2011-00088456-CU-EI-CTL and vacated all
 14 pending motion hearing dates. (Dkt. No. 98-4, Dickenson Decl. ¶ 10, Exs. 7, 8.)
 15 According to the Dickenson declaration, the state court dismissed the action without
 16 prejudice subject to reinstatement should the district court not grant Plaintiffs’ motion
 17 to amend and supplement. (*Id.* ¶ 10.)

18 Plaintiffs assert that because the related administrative rulings are allegedly in
 19 their favor, they now seek to pursue their federal causes of action in this Court. They
 20 assert that the City’s attempt to impose an unconstitutional general revenue is
 21 preempted by “state and federal law” and they argue that the “abstention and remand
 22 has served its purpose: the City has formally withdrawn its claims relating to
 23 ‘violations’ and demands for exactions regarding Plaintiffs’ home.” However, the
 24 standard under Pullman on when to return to federal court is not based on when
 25 Plaintiffs’ believes they are ready to return to federal court but once the state law issues
 26 have been either ruled on, resolved or dismissed.

27
 28 ⁵On December 7, 2012, Plaintiffs were ordered to file a second amended complaint.

1 Plaintiffs' England Reservation states the "Plaintiffs preserve their right to return
2 to the United States District Court for the Southern District of California for disposition
3 of remaining federal contentions after disposition of the questions of state law." (Dkt.
4 No. 69-13 at 3.) Contrary to their arguments, Plaintiffs' England Reservation indicates
5 that they will return to federal court after "disposition of the questions of state law."
6 Moreover, in the prior Court's order denying Plaintiffs' motion to reset trial and related
7 dates based on the fact that the Superior Court granted the writ of administrative
8 mandamus and entered judgment in favor of Defendant on March 5, 2013, Judge
9 Gonzalez noted that the Superior Court also remanded for further proceedings
10 regarding the newly asserted violations and a reassessment of the penalties consistent
11 with its ruling and stayed the remaining causes of action until the administrative
12 proceeding is complete. (Dkt. No.77.) The Court noted that it was "unclear whether
13 the Superior Court has resolved the state law claims" and the Court "is hesitant to
14 proceed without clear indication that the Superior Court has resolved the state law
15 claims." (Dkt. No. 77 at 6.) Similarly, at this time, there is no clear indication that the
16 Superior Court has resolved the state law claims. Recently, the docket in the 2011
17 petition reflects that an "OSC-Why Case Should Not be Dismissed" was set for
18 November 22, 2013. (Dkt. No. 98-11, Dickenson Decl., Ex. 7.) On November 22,
19 2013, the docket reflects that future motions and discovery hearings were vacated. (Id.)
20 The state court docket does not state that the case has been dismissed and even if it
21 were dismissed, there is no order or reasoning for the dismissal. Consequently, this
22 Court cannot determine whether the state court has resolved the state law claims.⁶
23 Moreover, the second filed petition, which is in essence an appeal of the City's
24 confirmation of the hearing officer's findings on June 24, 2013 based on the same
25 underlying facts, is still pending. Therefore, the Court finds it improper to rule on
26 Plaintiffs' motion to amend and motion to substitute Doe Defendants at this time and

27
28 ⁶Based on Plaintiffs' counsel's declaration, the state court dismissed the petition
subject to reinstatement, if necessary, should this Court deny Plaintiffs' motion to
amend. Therefore, it appears that the state court has not resolved the state law claims.

1 DENIES these motions without prejudice.

2 **B. Motion for Sanctions**

3 Plaintiffs seek sanctions against Defendant in the amount of \$4000.00 for the
4 time spent in bringing the motion for sanctions and filing a reply to the City's
5 opposition brief to Plaintiffs' motion to amend pursuant to 28 U.S.C. § 1927.
6 Defendant opposes.⁷

7 28 U.S.C. § 1927 provides:

8 Any attorney or other person admitted to conduct cases in any court of
9 the United States or any Territory thereof who so multiplies the
10 proceedings in any case unreasonably and vexatiously may be required
by the court to satisfy personally the excess costs, expenses, and
attorneys' fees reasonably incurred because of such conduct.

11 28 U.S.C. § 1927.

12 A crucial element for a fee award under this section is "bad faith." In re Peoro,
13 793 F.2d 1048, 1051 (9th Cir. 1986). "Section 1927 sanctions must be supported by
14 a finding of subjective bad faith, which is present when an attorney knowingly or
15 recklessly raises a frivolous argument, or argues a meritorious claim for the purpose
16 of harassing an opponent." B.K.B. v. Maui Police Dep't, 276 F.3d 1091, 1107 (9th Cir.
17 2002) (citation omitted). Thus, "[f]or sanctions to apply, if a filing is submitted
18 recklessly, it must be frivolous, while if it is not frivolous, it must be intended to harass
19 [R]eckless nonfrivolous filings, without more, may not be sanctioned." Id.
20 (quotations omitted).

21 Plaintiffs argue that the City has brought unsupported and unsubstantiated
22 accusations against Plaintiffs. The City opposes. While Plaintiffs dispute certain
23 allegations of the City as unreasonable and vexatious, these alleged statements subject
24 to sanctions are merely Defendant's allegations in defense of its case. Plaintiffs also

26 ⁷In opposition, the City indicated that on November 6, 2013, the City gave notice
27 to Plaintiffs' counsel that the City would file a motion requesting sanctions under
28 Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927 if Plaintiffs' motion for
sanctions was not withdrawn within 21 days as it is completely without merit. The
Court notes that the 21 day "safe harbor" period applies to Rule 11 sanctions, not 28
U.S.C. § 1927. Plaintiffs only move for sanction under 28 U.S.C. § 1927.

1 allege that the City also unnecessarily and without support impugned the Morrows’
 2 honor and respect for the rule of law by using phrases such as “ill-founded motives”;
 3 “unsubstantiated claims of ‘delay, dilatory motives, and apparent bad faith
 4 misrepresentation of both law and fact advanced by the Morrows””; “rather than
 5 succumb to the regulatory authority of the City over land within its jurisdiction;” and
 6 “Morrows’ latest allegations are nothing more than a blatant attempt to circumvent the
 7 City’s land use authority” The Court concludes that these allegations do not rise
 8 to the level of impugning Plaintiffs’ honor.

9 This case involves many years of animosity between Plaintiffs and the City of
 10 San Diego over the City’s code enforcement actions. In reviewing the motions filed
 11 by Plaintiffs and oppositions filed by Defendant and the history of the case, both parties
 12 have engaged in aggressive prosecution and defense of the case. Such conduct is not
 13 sanctionable under 28 U.S.C. § 1927.⁸


14 The Court concludes that Plaintiffs have not demonstrated bad faith, or reckless
 15 and frivolous conduct to warrant sanctions under 28 U.S.C. § 1927.

16 Conclusion

17 Accordingly, the Court DENIES Plaintiffs’ motion for leave to amend, and
 18 motion to substitute Doe Defendants without prejudice. The Court also DENIES
 19 Plaintiffs’ motion for sanctions.

20 IT IS SO ORDERED.

21
 22 DATED: December 4, 2013

23 
 24 HON. GONZALO P. CURIEL
 25 United States District Judge
 26

27 _____
 28 ⁸Plaintiffs seek fees incurred in filing their reply to their motion to amend. Filing
 a reply was not a filing that they were required to respond based on an unnecessary or
 frivolous filing by the City. A reply is a necessary pleading in filings motions.